SUMMARY OF EVIDENCE

It appears that the claimant, Ramon Jimenez, has continually been in a disability status since April 1, 1963, the time of original onset of his disability. For informational purposes it should be stated that the daughter, Magdalena, one of the illegitimate children, was determined to be in an entitlement status for the reason that she was born on August 13, 1963, shortly before the claimant, her father, became entitled to disability insurance benefits, in October, 1963, and she was not only acknowledged by the wage earner as his child but she was also, presumably, dependent upon the wage earner at the time he became entitled to disability insurance benefits.

In an interview of March 18, 1965, Elizabeth Hernandez, said that she and Ramon Jimenez have been living together about three years; that he has not divorced his wife, Filomena, who lives in Puerto Rico; that she, Elizabeth Hernandez, and Ramon Jimenez, the claimant herein, are the parents of Magdalena, Eugenio and Alicia Jimenez.—In an interview of October 2, 1969, claimant stated that he and Elizabeth Hernandez began living together some time in 1961.—In his application dated August 21, 1969 claimant stated that he had always supported said three children.—In an interview of October 2, 1969 claimant stated that he had never lived anywhere else with Elizabeth Hernandez except in the State of Illinois; that he has been supporting their children since their birth.

In his request for reconsideration which he filed on March 18, 1970, regarding his son Eugenio and his daughter Alicia, claimant stated that he did recognize these children in writing at the time prior to the beginning of his period of disability.

In the notice of reconsideration determination to the claimant dated May 5, 1970, it was stated in part as follows:

> "We have also considered the Amendments to the Social Security Act which provided various alternative tests which may qualify the children. Under these provisions, the child can qualify for benefits if

the father (1) acknowledges the child in writing or (2) decreed by a court to contribute to the child's support or (3) is shown by satisfactory evidence to be the child's father and living with or contributing to the child's support.

The Law requires that the acknowledgement, court decree, contributions or living with, must have been established at the time your disability began. A period of disability was established for you on April 1, 1963. The children were both born after this date and could not have been dependent on you even though you acknowledged them."

The aforesaid language of the notice of May 5, 1970 is borne out by the statutory provisions hereinabove cited. Thus, the son Eugenio, born on January 18, 1965, and the daughter, Alicia, born on February 24, 1968, born to Elizabeth Hernandez and fathered by the wage earner, cannot be eligible for entitlement to social security benefits, neither of them having been in being before or on October 1, 1963, when the wage earner first became entitled to disability insurance benefits.

It appears from the evidence of record that Magdalena, born on August 13, 1963, before the wage earner became entitled to disability insurance benefits, was eligible for entitlement purposes and that recently she was awarded benefits within the "maximum family benefit" clause as set forth in section 403(a) of the Act, herein before set forth. In this connection, claimant's counsel cites the case of Monica Jordan, by Carolyn Coleman, U.S.D.C., District of New Jersey, opinion filed on January 27, 1970 by Raynier J. Wortendyke, Jr. (J). In said case it is stated, in substance that Section 403(h)(3) creates one class, i.e., children. In said court decision it is further stated that the class born in-wedlock and those who were born out-of-wedlock, but acknowledged by the wage earner as his offspring, are both in the benefitted class. The inference drawn by claimant's counsel is that Magdalena, as early as August 13, 1963, the date of her birth, although born out-of-wedlock, was nevertheless entitled to a part of the maximum family

benefits, if indeed, the maximum family benefit should not have been enlarged so as to accommodate Magdalena and any and all children born out-of-wedlock which the wage earner might have produced or in the future will produce.

The Hearing Examiner is mindful of the rule of law which jealously guards the rights of innocent children against the transgressions of their parents. Yet the case of Jordan v.s. Finch is diametrically opposed to the clear and unequivocal wording of the statute.

FINDINGS OF THE HEARING EXAMINER

1. Eugenio, the son of the wage earner, born on January 18, 1965, and Alicia, the daughter of the wage earner, born on February 24, 1968, were not in being and thus could not have been dependent upon the wage earner as of October 1, 1963 when he was first entitled to disability insurance benefits.
2. Within the meaning of the Social Security Act, said son and daughter were not the children nor deemed to be the children of the wage earner.
3. Magdalena, the daughter of the wage earner, born on August 13, 1963, was and is in an entitlement status, but she is entitled to child's insurance benefits only under the provisions of Section 203(a) (403(a) of the Social Security Act.

DECISION

In accordance with the foregoing findings, it is the decision of the Hearing Examiner that the Administrative determination as to Eugenio, Alicia and Magdalena, is affirmed.

/s/ Thomas M. Walsh
THOMAS M. WALSH
Hearing Examiner

Date: December 11, 1970

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Baltimore, Maryland 21241

[SEAL]

REFER TO: 305-30-8719
WHEN WRITING TO:
SOCIAL SECURITY OFFICE
2306 W. Lawrence Ave.
Chicago, Ill. 60625

January 7, 1970

Ramon C. Jimenez
3556 N. Wilton
Chicago, Ill. 60657

This notice refers to your claim for benefits under the Social Security Act for Alicia and Eugenio Jimenez.

We cannot pay child's benefits on your claim because a requirement of the social security law is not met. That requirement is that the father had acknowledged the child in writing or had been ordered by a court to contribute to the child's support or had been judicially decreed to be the child's father before the period of disability began or it has been otherwise established that he is the child's father and was living with or contributing to the support of the child at the time his period of disability began.

If you believe that this determination is not correct, you may request that your case be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make any such request through your social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the determination made on your claim.

If you have any questions about your claim, you should get in touch with your social security office. If you call in person, please take this notice with you.

Sincerely yours,

/s/ F. H. Sheel
F. H. SHEEL
Director, Division of
Evaluation and
Authorization
Bureau of Disability
Insurance

Enclosure:
SSI-58

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. Box 2518, Washington, D.C. 20013

[SEAL]

BUREAU OF
HEARINGS AND APPEALS

HA:C
REFER TO: 305-30-8719

April 16, 1971

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Ramon Jimenez
3556 North Witton Avenue
Chicago, Illinois 60657

Dear Mr. Jimenez:

Your request for review of the hearing examiner's decision has been carefully considered by the Appeals Council. The Council's consideration of your request has included all the evidence in your case, the law and regulations applicable to your claim, the hearing examiner's evaluation of the facts and the reasoning in his decision, and your reasons for believing your claim should be allowed. Evidence in addition to that which was before the hearing examiner has been received by the Appeals Council.

The Appeals Council has concluded that the decision of the hearing examiner is correct. Further action by the Council would not, therefore, result in any change which would be of advantage to you. Accordingly, the hearing examiner's decision stands as the final decision of the Secretary in your case.

If you desire a review of the hearing examiner's decision by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside *within sixty (60) days* from this date. See section 205(g) of the Social Security Act, as amended

(section 405(g), Title 42, United States Code). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

Sincerely yours,

/s/ Jackson C. Smith
JACKSON C. SMITH
Member, Appeals Council

/s/ John T. Allen
JOHN T. ALLEN
Member, Appeals Council

cc: Jane G. Stevens
Attorney at Law

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No: 7- C 1436

MAGDALENA JIMENEZ, by RAMON JIMENEZ, her father and next friend, individually and on behalf of all others similarly situated, and EUGENIO JIMENEZ and ALICIA JIMENEZ, by RAMON JIMENEZ, their father and next friend, individually and on behalf of all other similarly situated, PLAINTIFFS

—*vs*—

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare, DEFENDANT

COMPLAINT

COUNT I

1: This is an action in the Judicial District in which Plaintiff resides to review a decision of the Secretary of Health, Education and Welfare. The Jurisdiction of this Court is based on 42 U.S.C. §405(g).

2: Plaintiff MAGDALENA JIMENEZ is a minor child of wage earner RAMON JIMENEZ: she is a citizen of the United States, and resides with her father in Chicago, Cook County, Illinois.

3: Plaintiff MAGDALENA JIMENEZ brings this action individually and as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all "claimants" for child's Social Security insurance benefits who are born out of wedlock, whose legitimate siblings receive or will receive at any time the total maximum family benefit to the total or partial exclusion of the illegitimate claimant.

The persons in this case are so numerous as to make joinder of all members unpracticable and there are questions of law common to all members of the class. The claims

of the individual Plaintiff are typical of the claims of the class, and the individual Plaintiff will fairly and adequately protect the interest of the class.

Separate actions by individual members of the class would create the risk of inconsistent adjudications that would establish incompatible standards of conduct for the defendant.

4: On August 21, 1969, RAMON JIMENEZ properly filed an application for child's insurance benefits on behalf of his three illegitimate children, including MAGDALENA JIMENEZ as provided by Section 202(d) of the Social Security Act (42 U.S.C. 402(d)).

5: On January 7, 1970, the Social Security Administration declared MAGDALENA entitled to child's insurance benefits as of August, 1968, but denied her rights to receive monthly benefits at that time. On March 18, 1970, Mr. Jimenez duly requested reconsideration. The Social Security Administration affirmed the decision and on June 30, 1970, Mr. Jimenez filed a request for a hearing.

6: After a hearing on November 18, 1970, Hearing Examiner Thomas M. Walsh, in a decision dated December 11, 1970, affirmed the denial of present equal benefits to MAGDALENA. A copy of this decision is attached hereto as "Exhibit A". On January 4, 1971, Mr. Jimenez requested a Review of the Hearing Examiner's Action.

7: The Appeals Council of the Social Security Administration denied Mr. Jimenez's request for review on April 16, 1971, thereby establishing the hearing examiner's decision as the final decision of the Secretary of Health, Education and Welfare.

8: This action for review of that final decision is commenced within the sixty (60) day period prescribed for such appeals.

9: RAMON JIMENEZ was awarded disability insurance benefits in October 1963, for a disability status that has existed since April, 1963. At that time auxiliary benefits were also awarded to Mr. Jimenez's wife, FILOMENA, and to their minor children, from whom Mr. Jimenez had

been separated for more than two years. Since his separation, he has lived with ELIZABETH HERNANDEZ who bore him three children out of wedlock, including MAGDALENA, one of the Plaintiffs herein, born August 13, 1963. RAMON JIMENEZ openly acknowledged MAGDALENA as his child. She has lived with her father since her birth; and has always been dependent on him for her support. Magdalena's dependence on her father has always been as great or greater than that of her legitimate siblings. Because Mr. Jimenez is disabled, MAGDALENA is presently supoprted by grants made to her father by the Cook County Department of Public Aid.

10: The Secretary's decision denying present benefits to MAGDALENA deprives MAGDALENA of that due process of law guaranteed to her by the Fifth Amendment to the Constitution of the United States because it is based on Section 203(a) of the Social Security Act (42 U.S.C. § 403(a)), which section is unconstitutional because it unreasonably and arbitrarily and without relation to the purposes of the Social Security Act denies MAGDALENA and all other members of the class shares of their parents' Social Security benefits equal to those granted to their legitimate siblings and even to any siblings who are born after an invalid ceremonial marriage between their parents, even though her needs are as great or greater than the needs of those siblings, solely on the basis of conduct of her parents which was beyond her control.

WHEREFORE, Plaintiff, MAGDALENA JIMENEZ prays that this Court:

1: Reverse the decision of the Secretary of Health, Education and Welfare denying present benefits to Plaintiff MAGDALENA JIMENEZ.

2: Direct the Defendant to pay to Plaintiff MAGDALENA JIMENEZ benefits equal to those paid each child of the wage earner RAMON JIMENEZ, and to pay Plaintiff retroactive equal benefits due to her since the date on which she became eligible,

3: Declare § 203(2) of the Social Security Act (42 U.S.C. § 403(a)) unconstitutional in so far as it denies to chil-

dren, as defined by § 216(H) (3) (42 U.S.C. § 416H) (3) equal shares in their family's benefits.

4: Enjoin the Defendant, his agents and employees from denying equal social security benefits to any member of the class.

COUNT II

1: This is an action in the Judicial District in which Plaintiffs reside to review a decision of the Secretary of Health, Education and Welfare. The Jurisdiction of this Court is based on 42 U.S.C. § 405(g).

2: Plaintiffs EUGENIO and ALICIA JIMENEZ are citizens of the United States; they are minor children of wage earner RAMON JIMENEZ, and reside with him in Chicago, Cook County, Illinois.

3: Plaintiffs EUGENIO and ALICIA JIMENEZ bring this action individually and as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all claimants for child's social security insurance benefits, who are born out of wedlock after their fathers have become entitled to receive Social Security insurance benefits by reason of old age, disability, or death. The persons in this class are so numerous as to make joinder of all members unpracticable and there are questions of law common to all member of the class. The claims of the individual Plaintiff are typical of the claims of the class, and the individual Plaintiff will fairly and adequately protect the interest of the class. Separate actions by individual members of the class would create the risk of inconsistent adjudications that would establish incompatible standards of conduct for the Defendant.

4: On August 21, 1969 RAMON JIMENEZ properly filed an application for child's insurance benefits on behalf of his children including, EUGENIO and ALICIA JIMENEZ, as provided by Section 202(d) of the Social Security Act (42 U.S.C. § 402(d)).

5: Mr. Jimenez's claim for benefits for EUGENIO and

ALICIA was denied January 7, 1970, and on March 18, 1970, he duly requested reconsideration of that denial.

May 5, 1970, the Social Security Administration affirmed the initial denial of benefits to EUGENIO and ALICIA, on the ground that the children had been born out of wedlock, after the beginning of Mr. Jimenez's period of disability. On June 30, 1970, Mr. Jimenez filed a request for a hearing.

6: After a hearing on November 18, 1970, Hearing Examiner Thomas M. Walsh, in a decision dated December 11, 1970, affirmed the denial of all benefits to EUGENIO and ALICIA. A copy of this decision is attached hereto as "Exhibit A". On January 4, 1971, Mr. Jimenez requested a Review of the Hearing Examiner's Action.

7: Plaintiffs reallege paragraphs 7 and 8 of Count I and incorporate them herein by reference.

8: RAMON JIMENEZ was awarded disability insurance benefits in October 1963 for a period of disability that began April 1, 1963. In October, 1963 auxiliary benefits were also awarded to RAMON JIMENEZ's wife, from whom he had been separated for several years, and to their minor children. Beginning approximately in 1961, RAMON JIMENEZ had lived with ELIZABETH HERNANDEZ who bore him three children, including EUGENIO JIMENEZ, born on January 18, 1965 and ALICIA JIMENEZ, born on February 24, 1968; the Plaintiffs herein.

EUGENIO and ALICIA have lived with RAMON JIMENEZ all their lives; Mr. Jimenez openly acknowledges them as his children and has always made a home for them; they have always been dependent on him for their support. Their dependence on their father has always been as great or greater than that of their legitimate siblings. Because Mr. Jimenez is disabled, EUGENIO and ALICIA are presently supported by grants made to their father by the Cook County Department of Public Aid.

9: The Secretary's decision denying benefits to EUGENIO and ALICIA JIMENEZ deprives them of the due process of law guaranteed to them by the Fifth Amendment of the Constitution of the United States because it is based

on Section 216(h)(3) of the Social Security Act (42 U.S.C. § 416(h)(3) which Section is unconstitutional because it unreasonably and arbitrarily and without relation to the purposes of the Social Security Act denies Social Security benefits to EUGENIO and ALICIA and to all other members of the class regardless of their needs, solely on the basis of conduct of their parents which was completely beyond their control.

WHEREFORE, Plaintiffs pray that this Court:

1: Reverse the decision of the Secretary denying the claims of EUGENIO and ALICIA JIMENEZ for child's insurance benefits;

2: Direct the Defendant to pay to EUGENIO and ALICIA benefits equal to those paid each child of the wage earner RAMON JIMENEZ; and to pay them all retroactive benefits due to them from the date of their claims;

3: Declare unconstitutional Section 216(h)(3) of the Social Security Act (42 U.S.C. 416(h)(3)) in so far as it denied Social Security benefits to illegitimate children born after their parents become disabled or otherwise entitled to receive Social Security insurance;

4: Enjoin the Defendant, his agents and employees, from denying Social Security benefits to any members of the class, and

5: Grant all such other relief as the Court deems just and proper.

JANE G. STEVENS
Attorney for Plaintiffs
LEGAL AID BUREAU
1413 West 18th Street
Chicago, Illinois 60608
421-1900

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 1436

MAGDALENA JIMENEZ, by RAMON JIMENEZ, her father and next friend, et al., PLAINTIFFS

vs.

ELLIOT RICHARDSON, Secretary of Health, Education, and Welfare, DEFENDANT

ANSWER

Now comes the defendant, UNITED STATES OF AMERICA, by WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, and in answer to the complaint states as follows:

COUNT I

1. Defendant admits the allegations contained in paragraph 1 of Count I of plaintiff's complaint.
2. Defendant admits the allegations contained in paragraph 2 of Count I of plaintiff's complaint.
3. Defendant denies the allegations contained in paragraph 3 of Count I of plaintiff's complaint and affirmatively asserts that under the applicable provisions of the Social Security Act plaintiff is not entitled to bring this action as a class action.
4. Defendant admits the allegations contained in paragraph 4 of Count I of plaintiff's complaint.
5. Defendant admits the allegations cotnained in paragraph 5 of County I of plaintiff's complaint but states that the request for a hearing was filed on July 30, 1970.
6. Defendant admits the allegations contained in paragraph 6 of Count I of plaintiff's complaint but states that the hearing was held on November 16, 1970.

7. Defendant admits the allegations contained in paragraph 7 of Count I of plaintiff's complaint.

8. Defendant admits the allegations contained in paragraph 8 of Count I of plaintiff's complaint.

9. Defendant lacks sufficient knowledge on which to form a belief as to the truth of the allegations contained in paragraph 9 of Count I of plaintiff's complaint.

10. Defendant denies the allegations contained in paragraph 10 of Count I of plaintiff's complaint.

COUNT II

1. Defendant admits the allegations contained in paragraph 1 of Count II of plaintiff's complaint.

2. Defendant admits the allegations contained in paragraph 2 of Count II of plaintiff's complaint.

3. Defendant denies the allegations contained in paragraph 3 of Count II of plaintiff's complaint and affirmatively asserts that under the applicable provisions of the Social Security Act plaintiff is not entitled to bring this action as a class action.

4. Defendant admits the allegations contained in paragraph 4 of Count II of plaintiff's complaint.

5. Defendant admits the allegations contained in paragraph 5 of Count II of plaintiff's complaint but states that the request for a hearing was filed on July 30, 1970.

6. Defendant admits the allegations contained in paragraph 6 of Count II of plaintiff's complaint but states that the hearing was held on November 16, 1970.

7. Defendant admits the allegations contained in paragraph 7 of Count II of plaintiff's complaint.

8. Defendant lacks sufficient knowledge on which to form a belief as to the truth of the allegations contained in paragraph 8 of Count II of plaintiff's complaint.

9. Defendant denies the allegations contained in paragraph 9 of Count II of plaintiff's complaint.

FURTHER ANSWERING the allegations contained in Count I and Count II of plaintiff's complaint defendant affirmatively asserts that plaintiffs are not entitled to the relief for which they pray under the applicable provisions of the Social Security Act, that plaintiffs are not entitled to

bring this action as a class action, that plaintiffs are not entitled to an injunction or a declaratory judgment, under the terms of the Social Security Act, and that the decision denying plaintiffs' application for relief is correct and in accord with applicable law and regulations.

FURTHER ANSWERING defendant affirmatively asserts that the findings of fact of the Secretary of Health, Education and Welfare are supported by substantial evidence and are conclusive; and in support of such affirmative assertion and in accordance with the provisions of Title 42, United States Code, Section 405(g), the defendant files herein as a part of the answer a certified copy of the transcript of the record including the evidence upon which the findings and decisions complained of are based.

WHEREFORE, the defendant prays that this Court affirm the decision of the Secretary of the Department of Health, Education and Welfare, which decision was made in accordance with applicable statutes and regulations of the Social Security Act, and accordingly prays for judgment dismissing the complaint with costs awarded to the defendant together with such other and further relief as this Court may deem just and proper.

WILLIAM J. BAUER
United States Attorney

MGE:dma

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 1436

MAGDALENA JIMENEZ, by RAMON JIMENEZ, her father and next friend, individually and on behalf of all others similarly situated, and EUGENIO JIMENEZ and ALICIA JIMENEZ, by RAMON JIMENEZ, their father and next friend, individually and on behalf of all other similarly situated, PLAINTIFFS

vs.

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare, DEFENDANT

No. 71 C 2628

ROBIN BOOKER, by FRANCINE BOOKER, her mother and next friend, PLAINTIFF

vs.

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare, DEFENDANT

MEMORANDUM OPINION AND JUDGMENT ORDER

These consolidated cases challenge the constitutionality of two sections of the Social Security Act inasmuch as they discriminate against a particular class of illegitimate children. A three-judge panel has heard plaintiffs' claims, jurisdiction for which is based upon 42 U.S.C. § 405(g) (1970). For the reasons stated below, this court grants defendant's motion for summary judgment and dismisses both cases.

Social Security benefits may be obtained on behalf of the children of an insured individual entitled to disability or death benefits under the Act. 42 U.S.C. § 402

(d) (1970). In determining whether an applicant is the child of an insured, 42 U.S.C. § 416(h) establishes three independent tests. First, an applicant is the child of an insured if he can inherit the insured's personal property under the law of intestate succession of the state of the insured's domicile. 42 U.S.C. § 416(h)(2)(A) (1970). Second, an applicant is the child of an insured if his parents went through a marriage ceremony that resulted in a purported, but nevertheless invalid, marriage. The invalidity must have been caused by a defect in the marriage procedure or by the failure of one of the parents to dissolve a prior marriage. 42 U.S.C. § 416(h)(2)(B) (1970). The third statutory definition of child encompasses those of the insured's issue who do not come within the first two provisions. An applicant for benefits is a child under 42 U.S.C. §416(h)(3)(B) if before the commencement of the insured's period of disability (1) he made an written acknowledgement that the applicant is his child, or (2) a court decree established the insured's paternity of the applicant, or (3) a court has ordered the insured to support the applicant because of paternity, or (4) if the Secretary finds sufficient evidence that the insured is the parent of the applicant and contributed to his support when the disability began. It is the treatment of this third class of children that is challenged in the instant case.

As noted above, 42 U.S.C. § 416(h)(3)(B) requires that the applicant be a child of the insured when his disability began. Ramon Jimenez has three illegitimate children, Magdalena, Alicia and Ramon, Jr. Because Alicia and Ramon, Jr. were born after their father became disabled, they are not considered his children under § 416(h)(3)(B) and may not claim benefits under the Act, even though Ramon, Sr. has supported and acknowledged them as his own. The situation of Magdalena Jimenez and Robin Booker is different from that of Alicia and Ramon, Jr. in that both of these illegitimate children were born to their parents before the disability commenced. However, they were not entitled to receive benefits because their families exceeded the maximum benefit limitations of 42 U.S.C. § 403(a) (1970). Although

the validity of § 403(a) was originally a substantial part of these lawsuits, the Supreme Court recently affirmed two three-judge court rulings which held § 403(a) unconstitutional.[1] Since we have no reason to believe that the Social Security Administration will fail to comply with those decisions,[2] a controversy no longer exists between defendant and plaintiffs Robin Booker and Magdalena Jimenez. Hence, their complaints are dismissed as moot and the subsequent scope of this opinion shall be limited to the constitutionality of § 416(h)(3)(B).

Prior to 1965, children who presently come within the § 416(h)(3)(B) definition of children were entirely excluded from receiving any benefits under the Act, even though the Act thereby discriminated between different classes of illegitimates.[3] In 1965, Public Law 89-97 added paragraph (3) to subsection (h) of § 416 and for the first time an entire category of illegitimate children became entitled to receive benefits through a parent's Social Security account, subject to the now challenged restriction that the event which triggered a child's entitlement (e.g., court decree or written acknowledgment) must occur before the onset of the insured's disability. It is clear that, both before and after the amendment, the statute does not simply discriminate against *all* illegitimate children, for a child could be born out of wed-

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[1] *Griffin* v. *Richardson*, Par. 16,759 CCH Unemployment Insurance Reports (D.Md. July 16, 1972), *aff'd*, 72-655, 41 U.S.L.W. 3340, December 18, 1972; *Davis* v. *Richardson*, 342 F.Supp. 588 (D.Conn. 1972), *aff'd*, 72-241, 41 U.S.L.W. 3340, December 18, 1972. *Accord*, *Maracle* v. *Richardson*, 41 U.S.L.W. 2197 (D.D.N.Y. September 21, 1972); *Morris* v. *Richardson*, 41 U.S.L.W. 2061 (N.D.Ga. July 20, 1972).

[2] Prior to the Supreme Court's disposition of the cases cited in note 1, *supra*, the Social Security Administration stated that it would refrain from following § 403(a) pending appeal of the decisions declaring it unconstitutional. *SSA Program Circular* No. 199, September 29, 1972.

[3] This exclusion was consistently upheld by the courts, although the precise question of its constitutionality does not appear to have been raised. *E.g.*, *Warrenberger* v. *Folsom*, 239 F.2d 846 (3d Cir. 1956); *Robles* v. *Folsom*, 239 F.2d 562 (2d Cir. 1956), *cert. denied*, 353 U.S. 960 (1957).

lock and hence illegitimate, yet nevertheless qualify under the first two statutory definitions of "child" contained in § 416(h)(2)(A) and (B). Thus, the statute effectively creates two categories of illegitimates and treats each differently.

Defendant urges us to uphold the constitutionality of this restriction because it is a reasonable means of preventing spurious claims. Plaintiffs assert that this restriction is an unconstitutional denial of due process because it is not rationally related to the objectives of the Social Security Act and because there are less restrictive alternatives available to prevent spurious claims. In considering these arguments, this court may not substitute its judgment of social policy for that of the legislature, but rather must consider whether Congress has the *power* to discriminate between classes of illegitimates as it has done in the Social Security Act. *Dandridge* v. *Williams*, 397 U.S. 471, 486 (1970).[4]

The power of Congress to discriminate is limited by the due process clause of the fifth amendment, which includes the principle of equal protection when a federal statute discriminates in an invidious manner or deprives persons of their fundamental constitutional rights. *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *Shapiro* v. *Thompson*, 394 U.S. 618, 641-42 (1969); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). In analyzing an alleged denial of equal protection, the Supreme Court has utilized basically two tests depending on the type of interest involved. *See generally Developments in the Law* EQUAL PROTECTION, 82 Harv. L. Rev. 1065 (1969). The traditional test consists of a two-part inquiry that first identifies the

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[4] As the Court states in *Flemming* v. *Nestor*, 363 U.S. 630, 611 (1961): "In judging the permissibility of the cut-off provisions of § 202(n) [of the Social Security Act] . . ., it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. 'Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom.' *Helvering* v. *Davis*, [301 U.S. 619 (1937)] at 644."

purposes or objectives of a legislative scheme and then asks whether the challenged discrimination bears a rational relationship to one of those purposes. Moreover, the purpose need not have been a main objective of the statute or even one that the leigslators had in mind when they passed it. *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960). The second test, that of the compelling state interest, is not applicable in this case because the Supreme Court has held that a challenged discrimination involving public welfare benefits must stand if it is "rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, *supra* at 487 (1970). *Accord*, *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Richardson* v. *Belcher*, *supra*; *Flemming* v. *Nestor*, *supra*. Therefore, inasmuch as § 416(h)(3) affects an interest in welfare benefits, it must be considered valid unless it is shown to be irrational and invidious.

However, in addition to asserting an interest in public welfare benefits, plaintiffs also assert an independent constitutional right to be free from a classification based solely upon their status at birth. They claim that this classification is subject to the compelling state interest test commonly found in racial discrimination cases such as *Bolling* v. *Sharpe*, *supra*. But, an examination of recent Supreme Court decisions on the rights of illegitimates convinces us that no such standard is applicable to a legislative classification based on legitimacy at birth and that this interest is also subject to the traditional rational relationship test.[5] *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Labine* v. *Vincent*, 401 U.S. 532 (1971); *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968); *Levy* v. *Louisiana*, 391 U.S. 68 (1968). Furthermore, the fact that § 416

[5] As indicated at note 1, *supra*, it is unconstitutional to discriminate against children falling within § 416(h)(3)(B) by eliminating their benefits in the manner prescribed by § 403(a). In three out of the four cases cited in note 1 the courts reached that result by aplying the traditional rational relationship test. In *Griffin* v. *Richardson*, *supra*, the court held that § 403(a) was unconstitutional under either the traditional standard or the compelling state interest test. Thus, our reliance upon the traditional test seems well-placed, despite the fact that our holding vindicates the constitutionality of the discrimination in this notably different context.

(h) (3) (B) does not apply to all illegitimate children but only to a well-defined category of them distinguishes this case from those just cited and from the Court's recent decision in *Gomez* v. *Perez*, 41 U.S.L.W. 4174 (Jan. 17, 1973), suggesting that factors other than illegitimacy might account for the discrimination here.

The Social Security Administration has asserted that the prevention of spurious claims is a factor that rationally supports the distinction made in § 416(h) (3) (B) because the purpose of the Act is to replace the support lost by a child when his father becomes disabled. *Watts* v. *Veneman*, 334 F.Supp. 482, 486 (D.D.C. 1971). *Accord*, *Hagler* v. *Finch*, 451 F.2d 45 (9th Cir. 1971), *cert. denied*, 405 U.S. 1071 (1972); *Perry* v. *Richardson*, 445 F.2d 677 (6th Cir. 1971). We agree. In the letters filed with this court subsequent to oral argument, the Administration cited examples which make it clear to us that, given the knowledge of the Act's provisions absent § 416(h) (3) (B), an insured would have both the opportunity and the financial temptation to file a spurious claim after his disability began. Thus, an insured's cash payments on account of his disability or old age can be increased by as much as one-half his individual entitlement, if he is able to claim one child as his dependent. To the unscrupulous person, all that prevents him from realizing such a gain is the mere formality of a spurious acknowledgement of paternity or a collusive paternity suit with the mother of an illegitimate child who is herself desirous or in need of the additional cash. Since a child's benefits are paid to the parent having custody of the child as "representative payee," the principals to such a scheme would have no trouble in realizing the fruits of their illegal venture. Moreover, collusive paternity suits and fraudulent acknowledgements of paternity would be extremely difficult to detect whether the Administration continued to rely upon its present procedures or was forced by this lawsuit to seek alternatives to § 416(h) (3) (B).[6]

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[6] The practical difficulties of proof in these situations have not escaped judicial attention. *See e.g.*, *Jerry Vogel Music Co.* v. *Edward B. Marks Music Corp.*, 425 F.2d 834, 836 n.4 (2d Cir. 1969).

On the other hand, the requirement that § 416(h)(3)(B) children be born before the onset of their parent's disability is based on the very simple, self-evident assumption that a person with nothing to gain from a spurious acknowledgement of paternity is not as likely to do so as one who could thereby increase his monthly income by one-half. Indeed, the probability is slight that an insured would make a spurious acknowledgment in anticipation of becoming disabled sometime in the future.

To this plaintiffs reply that the inter-personal consequences of such an acknowledgement are sufficient to discourage all but a few spurious claims and that the hardships befalling children like Alicia Jimenez and Ramon Jimenez, Jr. outweigh the adverse effects of a few fraudulent claims. They do not dispute the fact that the prevention of such abuse is a valid reason to discriminate, *Hagler* v. *Finch*, *supra*, but rather assert that there are less restrictive means of accomplishing this objective. However, even if such measures existed, their use is not constitutionally mandated under traditional notion of equal protection. Moreover, although plaintiffs assert that more restrictive regulations and internal administrative procedures could reduce such claims, they have not told us just how the Social Security Administration is to detect a collusive paternity suit or fraudulent acknoweldgment of paternity. Surely the parties to the collusion, who are in pari delicto, have little incentive to come forward and confess the error of their ways. And it would truly be the exceptional father who, having sired a child out of wedlock, would subsequently come forward, acknowledge his real paternity, and seek to have his child removed from the rolls of public welfare.

In sum, it must be remembered that plaintiffs bear the burden of proving § 416(h)(3)(B) to be an irrational means of preventing spurious claims. At best they have merely asserted that there are better ways to do so. That these plaintiffs may in fact be the children of Ramon Jimenez, Sr. suggests that it might have been more benevolent for Congress to allow them to share in these benefits. However, the question before us is one of congressional power and not wisdom. Having found § 416

(h) (3) (B) to be rational, we cannot second guess congressional wisdom even as applied to these particular facts. Since neither this nor any other court should alter a legislative judgment until convinced that Congress lacks the power to do what it has done, § 416(h) (3) (B) should be considered a valid exercise of legislative judgment until there exists convincing proof to the contrary.

Case dismissed.

/s/ Richard B. Austin
Honorable RICHARD B. AUSTIN
United States District Court

/s/ Bernard M. Decker
Honorable BERNARD M. DECKER
United States District Court

DATED: JANUARY 30, 1973

No. 71-C-1436, 71-C-2628

FAIRCHILD, *Circuit Judge* (dissenting). I respectfully dissent from the dismissal of the claims of Eugenio and Alicia Jimenez (the children born after Ramon's disability began). Legitimate children born after the beginning of disability, and otherwise qualified, would receive benefits, as would children born before the beginning of disability, whether legitimate or illegitimate. But no matter how clearly it can be shown that Eugenio and Alicia are the dependent children of Ramon, the statute excludes them from benefits which it grants to legitimate children otherwise similarly situated. I realize that a child who is unable to establish paternity with the certainty we accord to a child born to a married mother may properly be required to supply proof achieving a particular level of certainty, but this statutory exclusion is absolute, without regard to the certainty with which paternity might be proved.

I believe this exclusion of a class of dependent children from social security benefits effected by 42 U.S.C. § 416 (h) (2) and (3) to be constitutionally impermissible discrimination.

Recent decisions of the Supreme Court make it clear that statutory compensation schemes may not, in awarding benefits, prefer one class of dependent children over another according to their status of birth. *Weber* v. *Aetna Casualty & Surety Co.* 406 U.S. 164 (1972); *Richardson* v. *Davis*, 41 L.W. 3345 (1972), affirming *Davis* v. *Richardson*, 342 FSupp. 588 (1972); *Richardson* v. *Griffin*, 41 L.W. 3345 (1972); affirming *Griffin* v. *Richardson*, ¶ 16,759 CCH Unemployment Insurance Reports (D. Md., July 16, 1972). Significantly, the Court was not unmindful in these cases that children born out of wedlock presented difficult problems of proof as to actual dependency. In *Weber*, the Court indicated that they would respect a state's method of determining the genuineness of individual claims. However, the Court made it clear that once dependency was established, the Constitution required that all dependents—whether legitimate or illegitimate—must be treated equally. 406 U.S. at 175.

In a very recent decision invalidating state discrimination against illegitimate children in a system designed to provide for the needs of children generally, the Supreme Court said: "We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez* v. *Perez*, —— U.S. ——, 41 L.W. 4174, 4175, January 17, 1973.

The sole justification offered for the total exclusion of a class of dependent children [1] is that there may reasonably be thought to be a greater likelihood of plausible spurious claims among applicants born after the event which triggers entitlement of an alleged father to benefits.[2]

While I would agree that the need to guard against fraudulent claims is surely a valid legislative goal, I cannot agree that a total exclusion of a class of claims,—some of which will be demonstrably valid,—is a reasonable means of achieving that goal.

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[1] As the majority opinion makes clear, eligibility for social security children's benefits is not statutorily defined simply according to the status and time of birth. Nevertheless, I believe, in operation, § 416(h)(2) and (3), excludes from eligibility virtually all children of an insured individual who are born out of wedlock after the entitling event. It has never been suggested by the Secretary that even a significant percentage of this class will be able to establish their eligibility under § 416(h)(2)(A) and (B).

[2] This proposition is itself subject to question. Assuming that paternal acknowledgement is required, a number of factors must coalesce in producing a spurious but plausible claim. The insured individual must be willing to falsify in the face of criminal penalties and the societal and interpersonal condemnation to which he will be exposed. He must be willing to expose himself to legal obligations of support. The child's birth and the mother's situation must be consistent with the paternity asserted. And the mother must be willing to falsify. On the other hand, advances in the ability to exclude paternity as a result of blood tests greatly increase the possibility of dectecting spurious claims. Studies suggests that if a sufficient number of blood typing tests are utilized, "the average chance of obtaining an exclusion may eventually reach 80 to 90 per cent." Kramer, *Illegitimacy: Law and Social Policy*, Chapter 4, Part H, sub-part (i); Blood Typing (1971), pp. 123-127.

Carrington v. *Rash*, 380 U.S. 89, 92-97 (1965) establishes the principle that a statutory classification which totally excludes a class of persons from important benefits denies equal protection when less drastic means are available to effectuate the interest purportedly promoted by the classification. I think this principle is applicable here. In the context of a statutory compensation scheme, the total exclusion of a class of dependent children is simply too drastic a means to cope with the problem of spurious claims.

It is my opinion that insofar as portions of § 416(h)(3) constitute a requirement that an applicant be borne before the beginning of disability of an insured who is alleged to be the applicant's father, they are discriminatory and invalid. I would enjoin application of this requirement to plaintiff Eugenio and Alicia and others similarly situated.

I join Judge Austin and Judge Decker in the decision with respect to Magdalena Jimenez and Robin Booker.

SUPREME COURT OF THE UNITED STATES

No. 72-6609

EUGENIO AND ALICIA JIMENEZ, ETC., APPELLANTS

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare

ON CONSIDERATION of the motion of the appellants for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

December 3, 1973

SUPREME COURT OF THE UNITED STATES

No. 72-6609

EUGENIO AND ALICIA JIMENEZ, ETC., APPELLANTS

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare

APPEAL from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

December 3, 1973

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